Information Paper on 18 USC 205 (the general prohibition against Federal employees representing individuals or organizations before Federal agencies)

1. The statute. 18 USC 205(a) states:

> (a) Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the proper discharge of his official duties—
>
> (1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim; or
>
> (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest;
>
> shall be subject to the penalties set forth in section 216 of this title.

The term "covered matter" is defined at 18 USC 205(h) as follows: "For the purpose of this section, the term 'covered matter' means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter."

2. Covered matter. A Federal employee will violate 18 USC 205(a)(2) only if he or she represents someone before a Federal agency "in connection with any covered matter." As noted above, the term "covered matter" is defined to include a variety of things including "particular matters." In Van Ee v. Environmental Protection Agency, 202 F.3d 296, 310 (D.C. Cir. 2000), the court provided guidance on what a "particular matter" is for purposes of 18 USC 205.

> The interpretative consensus lends further support to our conclusion that § 205 is properly understood to apply to those matters in which a federal employee's representational assistance could potentially distort the government's process for making a decision to confer a benefit, impose a sanction, or otherwise to directly affect the interests of discrete and identifiable persons or parties. As a result, § 205 leaves career federal civil servants free to voice the concerns of citizens' groups of which they are members on broad policy issues because the likelihood that such representational assistance could divide the loyalty of the employee or distort the decisionmaking process is minimal.

3. Applicability. 18 USC 205 applies to military officers and Federal civilian employees, but not to enlisted military personnel. [18 USC 202(a); DoD 5500.07-R, Joint Ethics Regulation (JER), 17 Nov 11, para. 5-403]

4. SGEs. How 18 USC 205 applies to "special government employees" is addressed at 18 USC 205(c). "Special government employee" is defined at 18 USC 202(a) and at JER para. 1-227.

5. Definition of "agent". A Federal court decision provides the following guidance on the meaning of "agent" for purposes of 18 USC 205. O'Neill v. Dept. of Housing and Urban Development, 220 F.3d 1354, 1359-60 (Fed. Cir. 2000), states, in relevant part:

> Section 205 is one of a related group of conflict-of-interest statutes found in the criminal code at 18 U.S.C. §§ 202-209. ...The statute does not define the term "agent." Ms. O'Neill argues that in the absence of a special definition, the term must be given its common-law meaning and that her conduct does not render her an "agent" of Altamont within the common-law meaning of that term. We agree.
>
> It is a well-recognized principle of statutory construction that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." That rule applies with particular force to criminal statutes because of the related principles that courts may not create crimes and that criminal statutes must be strictly construed in favor of lenity.
>
> ... Section 205(a)(2) fits this model perfectly. It employs a term – "agent" -- that has a well-established and long-standing common-law meaning. The statute contains no definition of the term indicative of a congressional purpose to vary from the common-law meaning. And it is a criminal statute, which thus must be given a narrow construction consistent with the rule of lenity.
>
> ... [T]he term "agent" has a well-settled common-law meaning. Agency "is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." An agent acting on behalf of his principal has the authority to "alter the legal relations between the principal and third persons," and a "principal has the right to control the conduct of the agent with respect to matters entrusted to him." Thus, proof of actual or apparent authority to act on behalf of the principal is necessary to establish that a person acts as an agent both under the common-law and, as we construe it, under section 205(a)(2).
>
> Nothing in the language, context, or background of section 205(a)(2) suggests a different construction of the statute.

The U.S. Office of Government Ethics (OGE) has also issued an opinion that provides guidance on when a Federal employee is acting as an "agent" of another before a Federal agency. [OGE Informal Advisory Opinion 98 X 18, 16 Nov 98, pages 1-2] This opinion states:

> It is well settled that section 205 does not cover self-representation; rather, it is aimed at prohibiting representational activity on behalf of another. [Citation.] This representational activity on behalf of another, moreover, "entails at least some degree of control by the principal over the agent who acts on his or her behalf." [Citation.] The fact that the communication is in support of another's position does not, in itself, suggest the person communicating is acting as agent for the other. [Citation.]

6. Non-profits. There is an exception for representation of certain non-profit organizations at 18 USC 205(d).

7. Relatives. There is an exception for representation of certain relatives at 18 USC 205(e).

8. Self-representation. OGE Informal Advisory Opinion 98 X 18, 16 Nov 98, page 1, states: "It is well settled that section 205 does not cover self-representation; rather, it is aimed at prohibiting representational activity on behalf of another." OGE Informal Advisory Opinion 94 X 15, 28 Sep 94, page 1, states:

> Because section 205 does not prohibit self-representation, an employee may represent his own views before the Government in connection with a particular matter even if those views are the same as those held by an organization in which the employee happens to be a member. However, the employee could not communicate those views to the Government as the organization's representative without running afoul of the prohibition in section 205.

9. Ministerial communications. A DOJ memo discusses an exception to the representation ban for "ministerial communications." [DOJ Memorandum, Application of Federal Conflict-of-Interest Statutes to Federal Employees Working With or For Non-Federal Entities That Do Business with the United States, January 27, 1994] The memo gives examples of actions that would and would not violate 18 USC 205. The memo reads, in relevant part, as follows.

> Examples of prohibited "representational-type activities" include: (1) signing agreements with the Department or any other federal agency; (2) signing reports, memoranda, grant or other applications, letters, or other materials (beyond the mere exchange of purely factual information or the expression of a wholly-routine request not involving a potential controversy) intended for submission to any federal agency or tribunal; (3) signing tax returns for submission to the Internal Revenue Service; and (4) arguing or speaking (in the sense of *urging, advocating, or intending to influence*) to any other federal employee who is acting in his *official* capacity or before any federal agency or tribunal for or against the taking or non-taking of any action by the United States in connection with any matter involving the non-federal entity and the United States. [DOJ Memo, page 10, footnote 56, italics in original.]

> Section 205(a)(2) does not proscribe communications on behalf of a non-federal entity that are entirely *ministerial* in nature. Some examples of such communications might be: (1) conveying purely factual information; (2) merely delivering or receiving materials or documents; (3) answering (*without* advocating for a particular position) direct requests for information; (4) making *wholly*-routine requests that do *not* involve any potential for any controversy, dispute, or divergence of views between the agency and the non-federal entity (such as a request to use a meeting room); or (5) signing a document that attests to the existence or non-existence of a given fact (such as a corporate secretary's attestation that a given signature is valid or that a given person is authorized to bind or sign for the non-federal entity). [DOJ Memo, page 10, footnote 58, italics in original.]

10. Immigration letters. OGE Informal Advisory Opinion 07 X 7, dated 17 May 07, addresses letters by Federal employees in support of aliens applying for change in immigration status.

11. Exception for representation that is part of official duties. A Federal employee who represents someone before a Federal agency will not violate 18 USC 205(a) if the representation is done "in the proper discharge of his official duties." [18 USC 205(a)] In 1980, the Department of Justice issued an opinion that contains guidance on the meaning of this phrase. [Application of 18 U.S.C. §§ 203 and 205 to Federal Employees Detailed to State and Local Governments, Opinions of the Office of Legal Counsel, Volume 4B, page 498, March 17, 1980 (referred to as "DOJ opinion")] Here are three excerpts from that opinion.

> We believe that a federal employee performing a task that is integral to the statutory scheme administered by the employee's agency is engaged in "the proper discharge of his official duties" within the meaning of §§ 203 and 205. [DOJ opinion, page 500]
>
> [W]e believe that federal employees are performing "official duties," within the meaning of §§ 203 and 205, when they are involved in tasks that are integral to a substantive federal program. [DOJ opinion, page 503]
>
> [W]e do not believe that §§ 203 and 205 can be read to prohibit a federal agency from assigning its employees to tasks that are integral to the programs for which it is responsible, even if those employees must, in the course of carrying out their assignments, represent other parties before the federal government. [DOJ opinion, page 504 (footnote omitted)]

For example, an Area Defense Counsel who represents a military member in a court-martial or nonjudicial punishment action before a Military Department would fall under this exception.

12. Amicus Curiae Briefs. OGE Informal Advisory Opinion 06 X 12, dated 15 Dec 06, discusses whether a Federal employee may file an amicus curiae brief representing the views of an association in which he or she holds a position.

13. DC employees. How 18 USC 205 applies to employees of the District of Columbia is addressed at 18 USC 205(b).

14. The requirement for communication with a Federal agency with intent to influence. On 15 Jul 02, OGE issued a memo (OGE Legal Advisory DO-02-018) on this issue. The full text of the memo is below.

> SUBJECT: 18 U.S.C. § 205 Advice and Counseling
>
> Several non-Governmental groups recently have expressed concern to the Office of Government Ethics that 18 U.S.C. § 205 has been interpreted by some agencies to prevent Federal employees from holding office in, or otherwise participating in the affairs of outside organizations, even in the absence of any representational activities by the employees on behalf of the organizations. Although no specific instance of this advice has been brought

to our attention, the fact that several organizations raised the concern prompts us to issue this memorandum to emphasize that Section 205 should rarely prevent a Federal employee from serving with an outside organization where no representational activities are anticipated.

Section 205, in essence, prohibits an employee from serving as agent or attorney before the Government on behalf of another person. An employee does not act as agent or attorney before the Government in the absence of communication with, and intent to influence, the Government. Section 205 is not implicated by an employee's service as an officer or otherwise with an outside organization, in the absence of such representational activity. This is true even where the other persons in the organization have contact with the employee's agency.

Of course, other provisions of the conflict of interest statutes and the Standards of Ethical Conduct may also be relevant to a given fact situation. Ethics officials should continue to analyze any outside activity questions under those provisions as well.

We would appreciate your taking whatever steps are necessary to see that the correct interpretation of Section 205 is understood by employees at your agency.

15. Off-duty employment. On 22 Dec 06, the DoD Standards of Conduct Office issued SOCO Advisory 06-13. Paragraph 1 addresses 18 USC 205, and its full text is below. The Advisory is at: http://www.dod.mil/dodgc/defense_ethics/advisories/2006_advisories/adv_0613.htm

Application of 18 U.S.C. 205 and 203 to Federal Personnel Working As Contractors in the Federal Workplace (Usually on Terminal Leave or Moonlighting).

Few Federal personnel are aware that a criminal statute, 18 U.S.C. 205, prohibits them from acting as an agent or attorney (This means "representing" someone else.)

-for anyone,

-before any part of the Executive or Judicial branches of the Federal Government

-in connection with a particular matter

-in which the United States is a party or has a direct and substantial interest.

This does not apply to enlisted personnel. Modified rules apply to Special Government Employees.

While the statute applies to personnel throughout their Federal employment, it has particular relevance in two situations: (1) military officers who desire to work in the Federal workplace for a contractor while on terminal leave, and (2) all personnel who desire to work in the Federal workplace for a contractor during their off-duty time. This statute in most cases will make such employment impossible. However, because the statute does not bar

"communications which are merely ministerial in nature," such as seeking information that is routinely made available to the public or providing purely factual information, some employment may be possible.

In interpreting the statute, the U.S. Office of Government Ethics has opined that it does not bar "communications which are merely ministerial in nature, such as seeking information. Section 205(a)(2) does prohibit communications made in connection with a matter in which there is some controversy or at least potential for divergent views." (OGE Advisory Opinion 04 x 12). Consequently, where communications do not involve a potential for divergent views, or where the employees' actions do not constitute a communication, the prohibition does not apply.

While this opens the door for some employment of Federal personnel as contractors in the Federal workplace, it also places these personnel in positions to inadvertently violate the prohibition. The examples below illustrate application of the statute.

A Federal employee who moonlights as a custodian working for a contractor in a Federal agency, may, in theory, perform his or her functions without violating the statute, since the employee's duties do not primarily involve communications and most communications by the employee will be ministerial. However, if the employee was accused of not cleaning satisfactorily, the employee is prohibited by the statute from defending himself or herself in a discussion with a Federal official. Contractor employees who are not Government personnel must handle the complaint.

A Federal employee could moonlight as a security guard at a Federal facility, but would not be able to engage in a discussion with Federal employees about the guard's decision to deny admission to a visitor whose identity was in question.

A military officer on terminal leave, who is employed by a contractor as a consultant for a Federal agency, could not provide advice or consultant services concerning a particular matter if the matter has a potential for divergent views.

Bottom line: As stated earlier, it is almost impossible for Federal personnel to work for a contractor in the Federal workplace. In theory, they could perform roles that do not involve communications or that involve only ministerial communications. However, if the quality, quantity, or timeliness of their work is challenged, they may not participate in such discussions.

As The Office of Government Ethics warned, "As a general matter, [the employee] should take great care in avoiding any situation in which he may argue a position on behalf of [the organization] in a covered matter before any Federal employee in which there are potentially differing views or conflicting interests." (OGE 96 x 6)

Prepared by Mark Stone, Lieutenant Colonel, USAFR, Assistant Staff Judge Advocate, ASC/JA, Wright-Patterson Air Force Base, Ohio, on 30 Mar 12.